No. 83-6

In the Supreme Court of the United States

OCTOBER TERM, 1983

CARROLL D. BESADNY, ET AL., APPELLANTS

v.

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS IN PART AND AFFIRM IN PART

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to decide the appeal by the State of Wisconsin in *United States* v. *Wisconsin, et al.* (*Ben Ruby*) (7th Cir. No. 79-1014).

2. Whether the court of appeals correctly determined that the off-reservation hunting, fishing, and gathering rights of the Lac Courte Oreilles Band of Chippewa Indians under the Treaties of 1837 and 1842 were not abrogated by an 1850 Executive Order.

3. Whether the court of appeals correctly determined that the off-reservation hunting, fishing, and gathering rights of the Lac Courte Oreilles Band of Chippewa Indians were not abrogated by treaty in 1854.

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MOTION TO DISMISS IN PART AND AFFIRM IN PART

The Solicitor General, on behalf of the United States, moves the Court to dismiss the appeal for lack of jurisdiction insofar as it seeks review of the judgment of the Court of Appeals in *United States* v. *Wisconsin* (*Ben Ruby*) and to affirm the judgment of that court in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1983 (J.S. App. 175a). The petition for rehearing was denied on March 8, 1983 (J.S. App. 177a). A notice of appeal (J.S. App. 180a) was filed on April 27, 1983. The jurisdictional statement was filed on July 5, 1983. The jurisdiction of this

Court is invoked under 28 U.S.C. 1254(2). As we elaborate in a moment (pages 8-9, *infra*), we believe the Court lacks jurisdiction to entertain one aspect of the appeal.

STATEMENT

1. The present controversy stems from a series of mid-Nineteenth Century treaties and events involving the Lake Superior Tribe of Chippewa Indians in the territory that now comprises the State of Wisconsin. In 1837, the United States entered into a treaty with the Chippewas which provided that the Chippewa Nation of Indians "cede to the United States all that tract of country" described in the treaty, including what is now the Lac Courte Oreilles Reservation (7 Stat. 536; J.S. App. 59a). The treaty provided, *inter alia*, that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States" (J.S. App. 153a). Commissioner Dodge, representing the United States, assured the Indians that it would "probably be many years before your Great Father will want all these lands for the use of his White Children" (*id.* at 59a).

In 1842, the United States entered into another treaty with the Chippewas in which the Indians ceded certain lands north of the 1837 cession (7 Stat. 591; J.S. App. 156a-161a). The Indians stipulated "for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States * * *" (J.S. App. 157a). The 1837 and 1842 treaties together transferred approximately 5 million acres in the northern two-fifths of Wisconsin to the United States.

White settlers and miners began to move into the ceded territory shortly after the 1842 treaty (*id.* at 62a). By 1847, government agents had begun steps to remove the Chippewas (*id.* at 64a).[1] In 1850, President Taylor issued an Executive Order revoking the privileges of occupancy granted to the Indians in the Treaties of 1837 and 1842, and ordering them to remove to Chippewa lands in Minnesota (*id.* at 67a). Despite repeated efforts to carry out removal, many of the Chippewas refused to move (*id.* at 72a). By 1854, the Commissioner of Indian Affairs had concluded that creation of reservations in Wisconsin would be a more practical solution than the removal policy. The legislature of Wisconsin agreed and memorialized the President and Congress to halt efforts at removal (*id.* at 75a-76a). The government undertook to negotiate a new treaty.

The Treaty of La Pointe, 10 Stat. 1109, was concluded September 30, 1854. Under the treaty the Indians ceded certain land in Minnesota, and the United States agreed "to set apart and withhold from sale for the use of the Chippewas of Lake Superior" three described tracts of land, including one "on Lac Court Oreilles * * * equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President" (J.S. App. 163a). A survey of the land was accepted by the Surveyor General in 1856 (*id.* at 80a).

In 1859, a government agent was appointed to confer with the Lac Courte Oreilles chiefs to select a tract "equal in extent to three townships" from among

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[1] The Wisconsin Enabling Act with its grant of school lands was enacted in 1846, and Wisconsin was admitted to statehood in 1848 (J.S. App. 62a-63a).

nine townships which had been withdrawn for sale for that purpose (*ibid.*). The government agent sent a list of selected lands to the General Land Office and the selections were entered upon the land office plats in 1859. The selected lands included section 16 lands. Because the lands selected were not all contiguous and the boundaries were unclear, the selections proved unsatisfactory and disagreements arose (*id.* at 81a).

In 1865, additional lands were withdrawn from sale so that the Indians could make further selections of land to replace the troublesome detached tracts. In 1872, the Commissioner of Indian Affairs instructed his agent to negotiate an adjusted selection, omitting section 16 lands from final selections.[2] A final list of selected lands was approved by the Secretary of the Interior on March 1, 1873. They comprised 69,136.41 acres (slightly more than three townships) (*id.* at 81a-82a).

2. Three related actions were considered together by the district court, and decided in one opinion (J.S. App. 54a-147a). The first, *United States* v. *Wisconsin, et al. (Ben Ruby)*, was filed by the United States against the State of Wisconsin and various private parties (Ben Ruby, *et al.*). The United States sought a declaratory judgment that it held fee title to three sections of land within the exterior boundaries of the Lac Courte Oreilles Indian Reservation in Wisconsin for the benefit of the Lac Courte Oreilles Band of Chippewa Indians (the Band). Each of the

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[2] The agent was specifically instructed "to omit Section 16 of each township * * *. These sections are claimed by the State as school lands and it [is] thought best to avoid controversy in regard to them" (J.S. App. 81a). No sections 16 were included among the Indians' selections, and there is no evidence that the Indians objected to their exclusion.

three sections was a section 16, or "school section," *i.e.*, the section within a township set aside for public school purposes under the Wisconsin Enabling Act of August 6, 1846, § 7, 9 Stat. 56, 58. This Act granted each section 16 not "sold or otherwise disposed of" to the State for these purposes (J.S. App. 55a). The State based its claim on grants under that Act and the private defendants based theirs on subsequent patents granted by the State (*id.* at 55a-56a). The United States argued that the school sections had been "otherwise disposed of" as a result of treaties entered into by the Chippewas with the United States in 1837 and 1842 (*id.* at 55a). The district court held that title in the disputed section 16 lands is in the State and the State's grantees (*id.* at 137a). In so holding, however, the district court rejected the State's argument that the Indians' rights to land in Wisconsin, other than those subsequently granted by a treaty in 1854, were wholly extinguished by Executive Order in 1850. The United States did not appeal. However, the State took what it denominated a "cross-appeal" to challenge the basis for the district court's holding.

United States v. *Bouchard* was a criminal proceeding brought pursuant to 18 U.S.C. 1165 (*id.* at 55a). The United States claimed that Bouchard trespassed upon a waterway belonging to the Bad River Tribe, part of the Lake Superior Tribe of Chippewa (*id.* at 83a). Bouchard contended that the waterway involved did not belong to the Tribe or the United States but had become property of the State of Wisconsin upon its admission to the Union in 1848 (*id.* at 55a). The United States argued that the rights granted to the Chippewa by treaty in 1842 prevented passage of title to the State or, alternatively, that the 1854 treaty

between the United States and the Chippewa granted exclusive use of the waterway to the Tribe (*ibid.*). The district court dismissed the criminal information in *United States* v. *Bouchard*, finding that the waterway in question had become the property of the State of Wisconsin upon its admission to statehood in 1848 and therefore did not belong to an Indian tribe (*id.* at 84a). No appeal was taken in that case by the United States, and the State was not a party.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. *Voigt* was an injunctive and declaratory judgment action brought by the Band, in which it claimed the right to hunt, fish, and gather rice on publicly-owned lands in northern Wisconsin, free from state regulation, pursuant to the 1837 and 1842 treaties (*id.* at 56a). The United States was not a party to the proceeding. In its amended complaint, the Band asked the court to declare unconstitutional and enjoin the enforcement of Wis. Stat. Ann. § 29.09(1) (West 1973) insofar as it applied to the Band's off-reservation hunting, fishing, and trapping (J.S. App. 184a). Wisconsin Stat. § 29.09(1), which prohibits hunting, fishing, and trapping without a license, applies by its terms to "Indians hunting, fishing or trapping off Indian reservation lands" (*id.* at 182a). The district court held that any off-reservation hunting, fishing, and gathering rights reserved by the Band in the 1837 and 1842 treaties had been released or extinguished by the Treaty of 1854 (*id.* at 141a-142a). In reaching this conclusion, the district court specifically rejected the State's contention that the Band's hunting, fishing, and gathering rights had been revoked by the 1850 Executive Order (*id.* at 141a). The Band appealed and the State cross-appealed from the district court's decision. Accordingly, *Lac Courte*

Oreilles Band v. *Voigt* became the principal case on appeal to the Seventh Circuit (*id.* at 2a).

In the court of appeals, the United States participated only to the extent of questioning the propriety of the State's cross-appeal in *Ben Ruby*, in light of its having prevailed in the district court (Br. for the United States 5 n.5), and arguing that the 1850 Executive Order did not extinguish the Band's pre-1850 title because it was not enforced (*id.* at 5-6). The United States did not participate in briefing or argument in *Lac Courte Oreilles Band.*[3]

The court of appeals denied appellees' motion to dismiss the State's cross-appeal in *Ben Ruby* (J.S. App. 51a), and proceeded to the merits of *Lac Courte Oreilles Band.* While agreeing with the district court that the Band's off-reservation hunting, fishing, and gathering rights were not abrogated by Executive Order in 1850,[4] the court rejected the district court's holding that the Band's off-reservation rights were extinguished by treaty in 1854. Accordingly, the court of appeals held that the Band "has retained treaty-reserved off-reservation hunting, fishing, trapping and gathering rights, collectively termed 'usufructuary rights,' in public lands in the northern third of Wisconsin and that such rights preclude State regulation" (J.S. App. 2a). Without identifying the state laws or regulations to which its holding referred, or even citing Wis. Stat. Ann. § 29.09(1) (West 1973), the court remanded to the district court

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[3] As noted, no party appealed or cross-appealed in *United States* v. *Bouchard*, and that decision is not at issue before this Court.

[4] This was the issue on which the State cross-appealed in both cases.

"for further consideration as to the permissible scope of State regulation over the [Band's] exercise for [sic] their usufructuary rights" (*id.* at 52a).[5]

ARGUMENT

1. The United States moves to dismiss this appeal insofar as it seeks review of the decision of the case numbered 79-1014 in the court of appeals, *United States* v. *Wisconsin, et al. (Ben Ruby)*. We submit that the court of appeals had no jurisdiction to hear the State's appeal in *Ben Ruby*, and that the case is therefore not properly "in the court of appeals" for purposes of this Court's jurisdiction under 28 U.S.C. 1254(2).[6] Additionally, the State lacks standing as an aggrieved party necessary to appeal to this Court under 28 U.S.C. 1254(2).

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[5] In a case argued the same day before the same panel, but not involved in this appeal, the Seventh Circuit held that the Lac Courte Oreilles Band does not have jurisdiction to restrict hunting and fishing by non-Indians on navigable lakes adjacent to reservation lands (*Wisconsin* v. *Baker*, 698 F.2d 1323 (7th Cir. 1983), cert. denied, No. 82-1756 (June 27, 1983).

[6] The court of appeals correctly noted that the State could urge the validity of the 1850 Executive Order as an alternative basis for upholding the district court's judgment (J.S. App. 37a). Finding that the issue of jurisdiction over the State's cross-appeal would have "no effect on the course of our opinion or the disposition of this case," however, the court "assume[d], without so deciding, that the defendants are aggrieved parties who have standing to challenge the findings of the judge below as to the Removal Order" (*id.* at 37a-38a). This holding, we submit, was in error. The question of jurisdiction is prior to judgment on the merits (*Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981)), and in the absence of jurisdiction, the court of appeals should have granted the motion to dismiss.

The district court in *Ben Ruby* found title to the land in question in the State and its assignees, and the United States did not appeal. The State has no right of appeal to challenge the *reasoning* of the courts below, where it is not aggrieved by the judgment. "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980); see *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934). An exception is recognized only where the interests of the prevailing party are prejudiced by an adjudication of rights immaterial to the disposition of the main cause. *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242 (1939). In the instant case, the State is not prejudiced in any fashion by the district court's judgment in *Ben Ruby*, because it prevailed in all respects on the only matter in controversy, *i.e.*, title to the section 16 lands. No disposition of the State's cross-appeal could affect any rights of the parties to the litigation. See *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). This Court should therefore dismiss the appeal and vacate the judgment of the court of appeals, insofar as it pertains to the district court's decision in *Ben Ruby*.[7]

2. On the other hand, we believe that the State's appeal in *Lac Courte Oreilles Band*, No. 78-2443 in the court of appeals, is properly within this Court's jurisdiction under 28 U.S.C. 1254(2), notwithstanding

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[7] For the same reason, this Court lacks jurisdiction to review the *Ben Ruby* decision on writ of certiorari.

the court of appeals' failure to state in so many words that it was holding Wis. Stat. Ann. § 29.09(1) (West 1973) invalid as applied to members of the Band.

Statutes authorizing appeal to this Court are strictly construed. *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970). The general principle has therefore developed that appeals may not be taken where the invalidity of the state statute is neither an explicit basis for the litigant's federal claim nor a necessary predicate for the court of appeals' decision.[8] Here, the Band's amended complaint expressly sought invalidation of Wis. Stat. Ann. § 29.09(1) (West 1973) (J.S. App. 184a) and the court of appeals expressly held that the Band's off-reservation rights "preclude State regulation" (*id.* at 2a). There can be no question of a saving construction of the statute or of ultra vires enforcement, since the statute by its terms applies to "Indians hunting, fishing or trapping off Indian reservation lands" (*id.* at 182a). In short, a determination that Wis. Stat. Ann. § 29.09(1) (West 1973) is invalid as applied to members of the Band is

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[8] See Brief for the United States as Amicus Curiae in *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159. Copies of this brief have been provided to the parties in this appeal. An explicit statement by the court is necessary where the decision could be predicated on a finding other than invalidity of the state statute, for example: an interpretation of the statute designed to avoid questions about its constitutionality (see, *e.g.*, *United States* v. *Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 564-565 (1972) (28 U.S.C. 1252)); a finding of lawless behavior by state officials purportedly under a statutory grant of discretion (see, *e.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 562-563 n.4 (1980) (28 U.S.C. 1257(2)); or a finding of invalid non-legislative action pursuant to valid statutory authorization (see, *e.g.*, *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 4-5 (28 U.S.C. 1254(2)).

"a necessary predicate to the relief" ordered by the court of appeals. *California* v. *Grace Brethren Church*, 457 U.S. 393, 405 (1982), quoting *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980).

3. The State concedes, as it must, that the 1837 and 1842 treaties between the United States and the Chippewa Indians expressly reserved the Indians' rights to hunt, fish, and gather rice throughout the 15 million acres of northern Wisconsin, until the President should exercise his power of removal. At issue is whether those rights were lawfully abrogated by either (1) the Executive Order signed by President Taylor in 1850, or (2) the 1854 Treaty of La Pointe between the United States and the Chippewas.

We submit, as we did in the court of appeals, that the 1850 Executive Order did not abrogate the Chippewas' rights, either of occupancy or of use, because the Order was not enforced and was abandoned as national policy shortly after its promulgation. We also submit, on the issue not addressed in our brief below, that the court of appeals correctly construed the Treaty of 1854 and that plenary review by this Court of that fact-bound determination, consistent with other state and federal court judgments, is not necessary. We therefore urge this Court to affirm the judgment of the court of appeals.[9]

a. The district court and the court of appeals each concluded that the Executive Order signed by President Taylor in 1850 did not effectively extinguish the

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[9] We agree, for reasons stated by the court of appeals (J.S. App. 38a-42a), that the courts below were not bound by the decisions in *Mole Lake Band* v. *United States*, 139 F. Supp. 938 (Ct. Cl.), cert. denied, 352 U.S. 892 (1956), or *State* v. *Gurnoe*, 53 Wis. 2d 390, 192 N.W.2d 892 (Wis. 1972), by reason of res judicata or collateral estoppel.

Chippewas' hunting, fishing, and gathering rights under the 1837 and 1842 treaties because it was unauthorized by Act of Congress. The basis for this holding is that the Chippewas' understanding of the 1837 and 1842 treaties was that their rights would not be divested unless they "misbehaved," the land was needed for settlement, or a lengthy period of time, perhaps a generation, had passed. The courts further determined that none of these conditions had come to pass by 1850 and concluded, therefore, that the Executive Order was not valid. The State challenges this conclusion on two grounds. It asserts first that the authority of the President under the 1837 and 1842 treaties to remove the Chippewas from Wisconsin and hence to abrogate their rights of occupancy and use was unfettered (save for the requirement that he exercise sound discretion) (J.S. 13). It further asserts that, properly drawing all inferences in favor of the party against whom summary judgment was granted, there was ample evidence of "serious misbehavior" by the Chippewas justifying the removal order (J.S. 15, 18-20).

This Court need not resolve this controversy. Whether or not valid and authorized, the 1850 Executive Order does not determine the legal issues at hand because the Order was never enforced. As early as August, 1851 the Office of Indian Affairs instructed the superintendent in Wisconsin to "[s]uspend action with reference to the removal of Lake Superior Chippewas for further orders" (J.S. App. 71a). A delegation of Chippewas met with President Fillmore in 1852, and were reportedly told that the removal order would be countermanded. Also in 1852, the Chief informed his people that a new treaty would be negotiated (J.S. App. 73a-74a), and in 1854

the Treaty of La Pointe was signed, guaranteeing permanent homes to the Chippewas in Wisconsin.

This summary of the events of 1850-1854 shows that the removal order of 1850 was quickly abandoned as the policy of the United States, and superseded by the Treaty of La Pointe. Thus, the rights of the Chippewas in Wisconsin are determined not by the terms of the Executive Order, but by the terms of the 1854 Treaty. This was the conclusion reached by the Wisconsin Supreme Court in *State* v. *Gurnoe*, 53 Wis. 2d 390, 405-407, 192 N.W.2d 892, 899-900 (1972). The state and federal courts directly involved in interpretation of land rights in Wisconsin have thus agreed that the 1850 removal order does not have the effect of extinguishing the Chippewas' pre-1850 rights. There is no need for this Court to review the issue.

b. The effect of the 1854 treaty on the hunting and fishing rights of the Band, while less clear, was correctly determined by the court of appeals and presents no question justifying plenary review by this Court. By its terms, the 1854 treaty did not extinguish any of the Chippewas' rights, whether of use or of occupancy, in Wisconsin.[10] Nevertheless, it is obvious that the establishment of fixed, permanent reservations implied that the Indians were giving up their rights of occupancy outside of the reservation. This is confirmed by a statement of the Chippewa Chief Buffalo during the negotiations: "We now understand that we are selling our lands as well as the timber and that the whole, with the exception of what we shall reserve, goes to the great father for-

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[10] The Tribe expressly ceded its rights to land in the Territory of Minnesota.

ever" (J.S. App. 77a).[11] On the other hand, there is no necessary implication that the 1854 treaty also abrogated the residual off-reservation hunting, fishing, or gathering rights of the Band.

It is well settled that tribal *use* rights—including hunting and fishing—may subsist in areas as to which title and rights of occupancy have been ceded. See, *e.g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *United States* v. *State of Michigan*, 653 F.2d 277 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981). Indeed, the Wisconsin Supreme Court has recognized off-reservation fishing rights in Lake Superior on behalf of the Chippewas, stemming from the same set of treaties involved in this case. *State* v. *Gurnoe*, *supra*, 53 Wis. 2d 407-409, 192 N.W.2d at 900-901. The Michigan Supreme Court has reached a similar conclusion in construing parallel treaties of the same time period with Chippewa and Ottawa Indians in Michigan. *People* v. *Le Blanc*, 399 Mich. 31, 248 N.W.2d 199 (1976); accord, *United States* v. *State of Michigan*, *supra*.

The court of appeals' conclusion that the Band's right to hunt and fish on unsettled land outside the boundaries of the reservation was not disturbed by the 1854 treaty is supported by the economic circumstances and subsequent activities of the Band at the time. The Chippewas were heavily dependent on hunting and fishing as their means of livelihood. As

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[11] In the document setting forth the Band's selections of land to comprise the Lac Courte Oreilles Indian Reservation, the Band's headmen agreed "to use all our authority and influence to induce our people to abandon the lands sold or ceded to the United States by us and our fathers, and to rest with us upon the lands selected by us and described within our reservation and homes" (J.S. App. 80a).

the court of appeals noted (J.S. App. 49a), the Chippewas' way of life required that they be able to roam throughout the ceded territories. Cf. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918). The Wisconsin Supreme Court expressly relied on this factor when it determined that the Chippewas retained off-reservation fishing rights under the 1854 treaty. *State* v. *Gurnoe*, *supra*, 53 Wis. 2d at 409, 192 N.W.2d at 901. Significantly, after the treaty and the establishment of a reservation, members of the Chippewa Tribe continued to hunt and fish in unsettled areas throughout northern Wisconsin (J.S. App. 15a).

The court of appeals properly and carefully examined the treaty and the historical evidence surrounding it, and concluded that the Band retains off-reservation hunting, fishing, and gathering rights on public lands in northern Wisconsin. It reached a conclusion consistent with that of the Wisconsin Supreme Court, and similar to that of the Michigan Supreme Court and the Sixth Circuit construing similar treaties with the Chippewa in Michigan. Although other conclusions might be reached on the evidence, there is no reason for this Court to engage in plenary review of this essentially fact-bound issue.[12]

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[12] The State argues that the decision below conflicts in principle with this Court's canons of interpretation of Indian treaties, because the court applied "a rule that the only consideration in treaty interpretation is the 'understanding' of the Indian parties to the treaty" (J.S. 9). This contention is without merit. The court of appeals considered the historical record as a whole, and correctly applied this Court's rule that an Indian treaty "must * * * be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979).

4. The State has asked this Court in the alternative to consider its papers as a petition for a writ of certiorari (J.S. 2). We submit the same reasons that support summary affirmance argue for denial of certiorari. Moreover, if the plea for review is addressed to the Court's discretion, we believe it should be rejected as premature. The court of appeals has remanded the case to the district court for further consideration of the permissible scope of state regulation. The State makes much of the so-called "practical effect" (*id.* at 16) of the court of appeals decision, claiming that Wisconsin's fish and game resources "may decline substantially as a tourist or recreation attraction * * * [because the] Chippewa * * * can potentially hunt and fish the resources down to barely self-sustaining levels" (*id.* at 18). There is no basis for such a claim at this stage in the litigation. On remand, the State will have an opportunity to present its argument as to the scope of regulation over the Band's reserved rights necessary for the conservation of its natural resources (J.S. App. 52a; see *Puyallup Tribe, Inc.* v. *Dep't of Game*, 433 U.S. 165, 175-177 (1977); *Puyallup Tribe* v. *Washington Game Dep't*, 391 U.S. 392, 398 (1968)).

CONCLUSION

The appeal should be dismissed in part for lack of jurisdiction and in other respects affirmed. Considering the appeal as a petition for certiorari, such petition should be denied.

Respectfully submitted.

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